SUPREME COURT, U. S.

No. 326

FILED

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PETITION FOR WRIT OF CERTIORARI

THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner for Certiorari,

vs.

TAYLOR STEEL PRODUCTS COMPANY, NEW MONARCH MACHINE AND STAMPING COMPANY, and KOLLWOOD, INC., Each a Corporation,

Respondents in Certiorari.

PETITION FOR WRIT OF CERTIORARI FOR REVIEW OF JUDGMENT OR DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Petitioner

IN THE SUPREME COURT OF
THE UNITED STATES

WYMAN C. LOWE,

Petitioner for Certiorari,

VS.

TAYLOR STEEL PRODUCTS COMPANY, NEW MONARCH MACHINE AND STAMPING COMPANY, and KOLLWOOD, INC., Each a Corporation,

Respondents in Certiorari.

PETITION FOR WRIT OF CERTIORARI
FOR REVIEW OF A DECREE OF THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The official report of the opinion delivered in the United States Court of Appeals for the Eighth Circuit to which this petition for writ of certiorari relates and applies begins on page 65 in 373 F 2nd (1967) (Advance Sheets, Number 2, dated April 17, 1967). A copy of that opinion is appended hereto.

The decree of that United States Court of Appeals sought to be reviewed was rendered on February 23, 1967 and entered on that date.

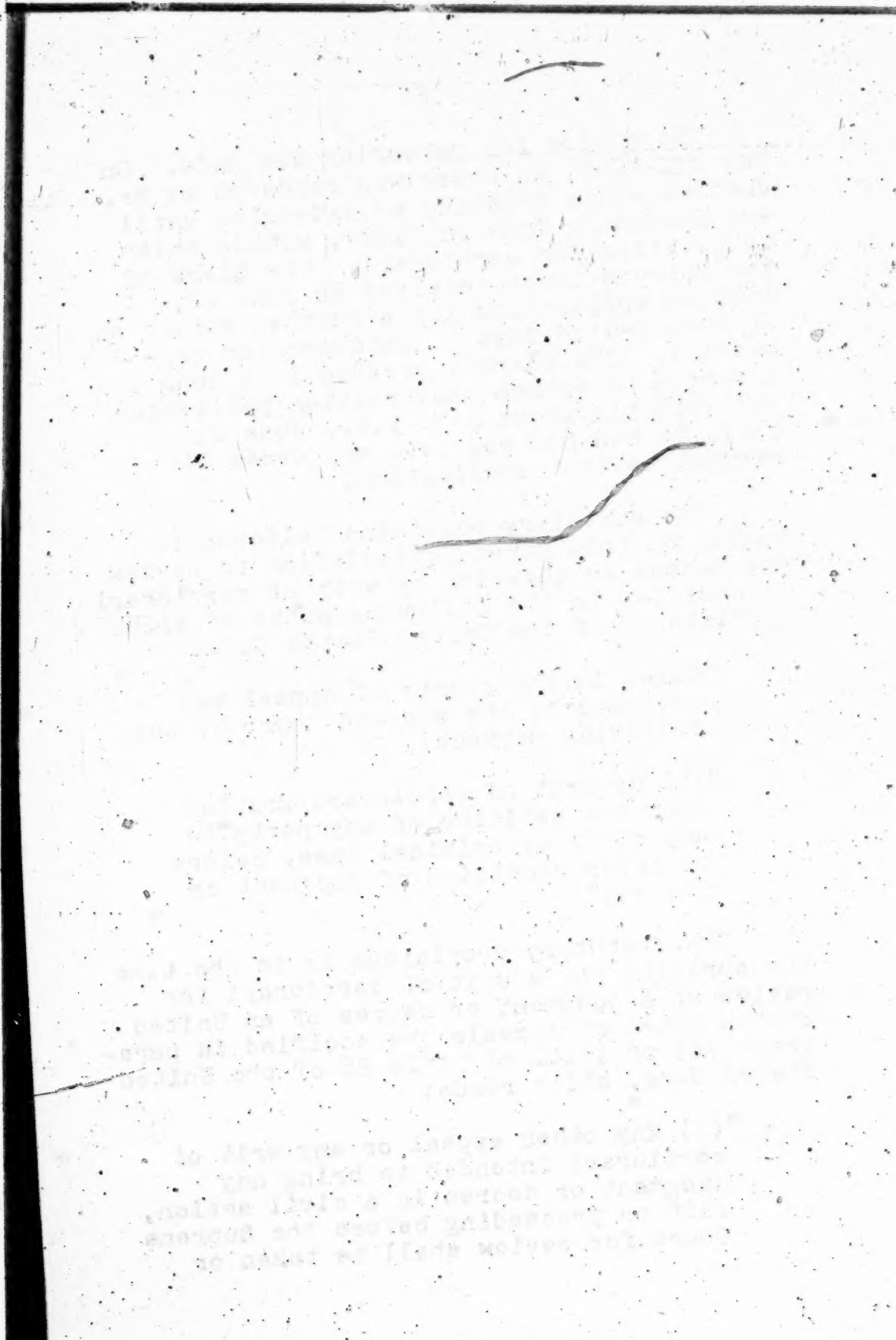
No motion for rehearing was made. On May 24, 1967, an Order was rendered by Mr. Justice White granting an extension until and including June 24, 1967, within which to petition for certiorari. The Clerk of the Supreme Court received on June 22, 1967 an application for a further extension of twenty-nine days to petition for certiorari. The Clerk indicated in a long distance telephone conversation petitioner had with him about 4:50 P.M., June 23, 1967, he had not received any Order with respect to that application.

The statutory provision believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari is codified in the following parts of §1254 of Title 28 of the United States Code:

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

The statutory provisions as to the time for applying for a writ of certiorari for review of a judgment or decree of an United States Court of Appeals are codified in paragraph (c) of §2101 of Title 28 of the United States Code, which reads:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or



"applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The plaintiff-appellant filed an amended and substituted petition in the Trial Court. In it he sought damages for injuries he had received while operating a "Taylor" power lawn mower, designed and manufactured by two of the defendants, Kollwood, Inc. and its subsidiary, New Monarch Machine and Stamping Company, a corporation. The third defendant named in plaintiff's pleadings, Taylor Steel Products Company, a corporation, which was a subsidiary of Kollwood, Inc., had been, in effect, dormant for several years prior to the time of manufacture by the other two defendants of the mower.

Plaintiff paid a neighbor of plaintiff's tenant, to whom plaintiff rented a dwelling at 2038 Arlington Circle, N.W., in Atlanta, Georgia, for rent of the mower and services of the neighbor's minor son in assisting plaintiff in mowing the lawn in front of the said dwelling. Plaintiff had never before operated a power lawn mower or had his hands on one. The owner of the mower and his minor son, who had an appearance, because of his large size, of being about sixteen years of age, but was only twelve years of age, cut portions of the lawn. The main part of the lawn was about level. That part of the lawn adjoining Arlington Circle, a street, sloped downward from the street to the about level portion of the lawn. Plaintiff used the mower on the level portion of the lawn several minutes the after-

noon of the day before he was injured and also on the afternoon he was injured, September 16, 1963. The owner of the mower warned plaintiff of danger in using the mower on the sloping part of the lawn, but immediately before plaintiff was injured while operating it on the sloping part of the lawn, himself mowed half of the sloping part of the lawn safely and then handed the handle of the mower to plaintiff for plaintiff to use the mower to mow the remaining sloping part of the lawn. In the presence of the owner of the mower, plaintiff, acting on advice of a hardware company, tied one end of about a ten-foot rope to about the central part of the handle of the mower and handed the other end of the rope to the boy to hold. Plaintiff instructed the boy, who had had considerable experience in mowing with that mower for pay lawns of other persons in the neighborhood, parts of the lawns sloping downward from the street, never to pull on the rope unless the handle of the mower got out of grasp of plaintiff's hands and began rolling down the lawn. Plaintiff so used the rope for protection of small children who had been playing on level part of the lawn. In order to have better traction and be able to maintain his balance, plaintiff removed his shoes. Plaintiff proceeded to push the mower in strokes down the sloping part of the lawn to cut grass thereon and then to pull it back.

On about the third stroke, while plaintiff was pulling the mower upward, the blade of the mower struck a small pebble protruding a fraction of inch above the ground but concealed by the grass, causing the mower in some manner to jump onto or get on top of plaintiff's left foot.

Serious injury was thereby caused to plaintiff's left foot. His largest toe, together with the adjoining toe, and most of his middle toe were cut off, some tendons and ligaments in the left foot were severed, and lacerations caused on top of part of the foot.

The blade of the mower was enclosed inside a one-piece metal housing which had four sides that extended downward from the top about three and one-half inches. The blade was not visible to plaintiff or anyone else unless the housing was tilted on a side or turned upside down. The mower had no sign on it to warn an operator of the mower to keep feet or toes from under the mower. It did not have any kind of safety upstop latch for the handle to prevent the handle from being pushed forward to any angle and thereby causing feet and toes of an operator to come within dangerous proximity of the blade. There was no metal or other kind of guard within the housing of the mower between the tip ends of the blade and sides of the housing. When the blade revolved or did not revolve while the mower was setting in normal upright position or revolved while the mower was being used to cut grass, its lowest cutting edges protruded slightly beneath the lowest edges of the four sides of the housing of the mower.

In its pretrial order, the Trial Court had ordered the plaintiff, Wyman C. Lowe, to state specifically the acts relied upon constituting defendants' negligence. In compliance, before the trial began, plaintiff filed the following Specifications of Negligence:

"1. In failing to warn users of the rotary power mower of the dangers involved in its use, and in failing to warn of the dangers of getting his feet under said mower.

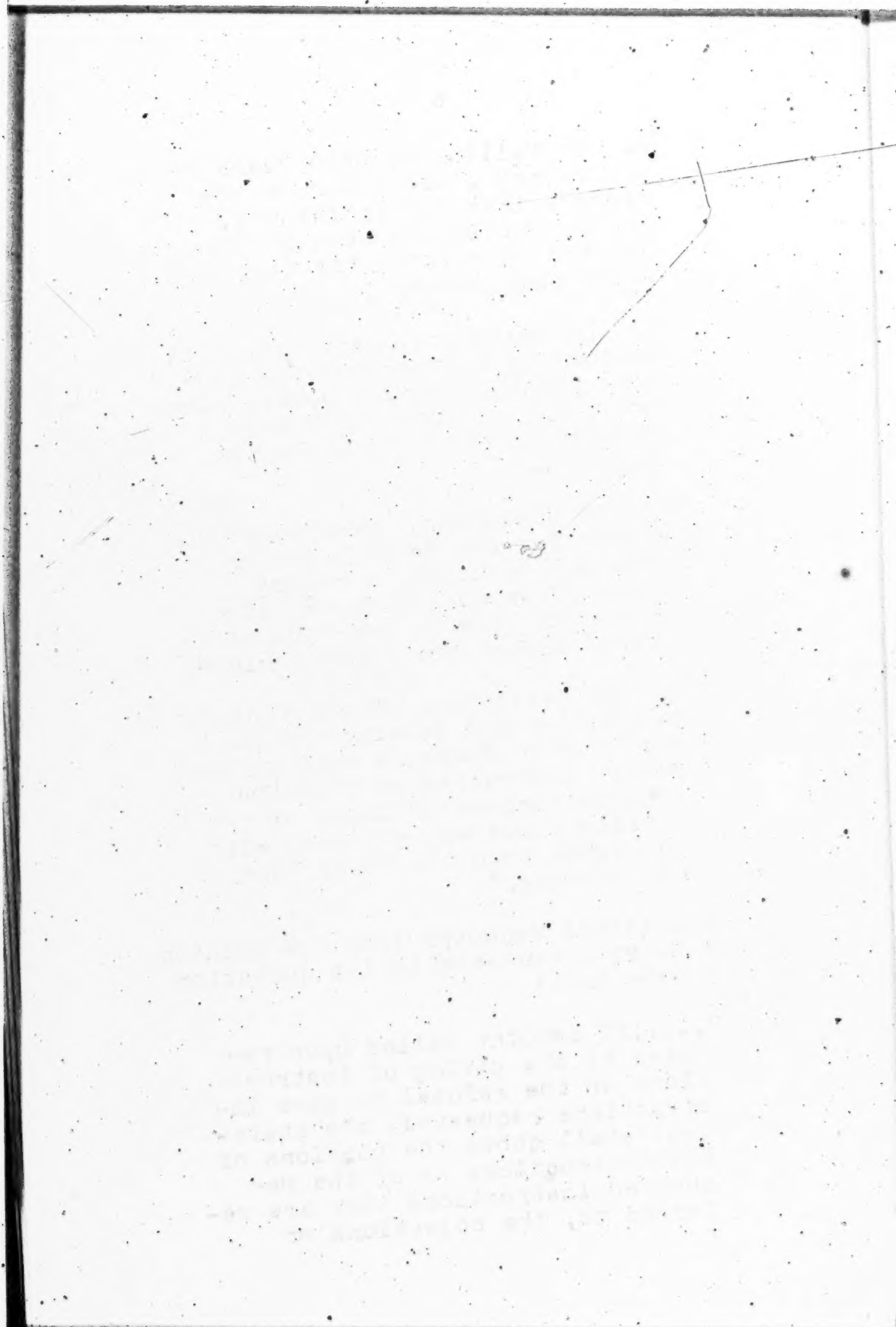
"2. In designing, manufacturing, assembling and selling for general public usage, a rotary power mower not equipped with safety devices in the form of handle up-stops.

"3. In designing, manufacturing, assembling and selling for general public usage, a rotary power mower not equipped with safety devices in the form of guards around the cutting blade.

"4. In designing, manufacturing, assembling and selling for general public usage, a rotary power mower constructed so that the minimum horizontal level of the cutting blade was not even with or higher than the lower edge of the housing."

Petitioner requotes from the opinion of the Court a sentence in its quotation of its Rule 11(b)
Third:

".....If a point relied upon relates to the giving of instructions or the refusal to give instructions requested, the statement shall quote the portions of the instructions or of the requested instructions that are referred to, the objections or



"exceptions taken to the giving of the instructions or to the refusal to give instructions and the rulings of the Court thereon."

Justice Mehaffy of said Court of Appeals indicates in the opinion that appellant-petitioner did not observe this Rule and it is further indicated in some of the headnotes, in effect, that exceptions made were to the Instructions of the Court as a whole, and that the exceptions were too general and not specific enough.

Appellant-petitioner made an insert of pages 24-a through 24-u to his main brief, these pages not being bound within the brief. Pages 24-d through 24-q deal with the Court's Instructions, the Instructions requested by the plaintiff, the exceptions made by plaintiff's counsel to certain of the Court's Instructions and the failure of the Court to make some of the Instructions requested by plaintiff's counsel. It appears that the Court of Appeals may have overlooked these loose pages within the brief. It is respectfully pointed out that some of the plaintiff's exceptions to some of the Court's Instructions and its failure to give some of the plaintiff's Requested Instructions appear to be pointed out with sufficient specificity on those pages. Plaintiff also filed a Reply Brief, after permission by the Court, but Judge Mehaffy seems nowhere in the opinion delivered to make any reference to any part of that Reply Brief. Part of that Brief deals with questions as to Instructions given by the Court and the failure of the Court to make some of plaintiff's Requested Instructions and plaintiff's exceptions

thereto.

One example in this connection to which plaintiff refers in one of his said pages of his main brief is plaintiff's exception as made to the failure of the Court to give his Instruction No. 4, which Requested Instruction appears on page 23 of the Record, as certified to this Court. That Requested Instruction No. 4 reads:

> "In connection with Plaintiff's claim, you are instructed that the designer, manufacturer and assembler of an article inherently dangerous to life or limb is liable to a third person for personal injuries resulting from the failure of the manufacturer to exercise due care to protect anyone having proper occasion to use the article in the manner intended, by using such precautionary means as the character of the article requires." (Record, p. 23)

Plaintiff's exception as made to the failure of the Court to give his Instruction No. 4 was (R, p. 252):

> "With respect to the plaintiff's requested instruction number four, that the statement of law contained in requested instruction number four is a proper statement of the case relating to the manufacturer's duty regarding design, and that the same is not covered either in form or substance in the instructions given by the Court."

The Court's ruling upon plaintiff's Instruction No. 24 was:

"Well, it's not covered in that form, but I consider the principle as covered. I'll say in substance." (R,p.251)

Plaintiff next stated in his brief one of his points to be "that the Court failed to cover in substance or in form Plaintiff's Requested Instruction No. 4 in the Court's Instructions." Plaintiff then cited authorities and a number of Appellate Court decisions in support of that point, some of them being:

"Rausch vs. American Radiator Co., 252 Iowa 1 46 Am. Jur. 938, Sec. 814

....

Pariser v. Wappler Electric Co., 260 N.Y.S. 35, 145 Misc. 315

U.S. - Schindley v. Allen - Sherman - Hoff Co., 157 F 2d 102

Borg - Warner Corp. (Norge Div.) v. Heine, 128 F. 2d 657"

The Court's Instructions appear on pages 28-49 of the copy of the Record, as certified by the Clerk of said Court of Appeals. The plaintiff's Requested Instructions appear on pages 22-27 of that Record. The plaintiff's exceptions to some of the Instructions of the Court and the failure of the Court to make some of plaintiff's Requested Instructions, together with certain colloquy between the Court and Mr. Hogun, of plaintiff's counsel, appear on pages 252-259 of that Record. It is respectfully requested that the Court review those pages of the Record.

Reference is made to pages 172-178 of the Record, which show the discussion among the Court and counsel for the parties as to admission into evidence of Joseph Brodecki, a safety and mechanical engineer and a graduate of Georgia Tech, together with an Exhibit introduced at the taking of his deposition in Atlanta, Georgia. The Court declined to admit the deposition and the Exhibit into evidence and, in effect, suppressed them. Petitioner contends that this was a serious error made by the Court and vitally affected the outcome of the case. The said Exhibit, an article as to safety features, particularly safety up-stop latches for handles for power lawn mowers and metal guards within the housing of them, was written by said Mr. Brodecki, approved after the review thereof by members of the National Safety Council and representatives of the American Society of Safety Engineers. The article recommended specifically such up-stop safety latches for handles of such mowers and metal guards within the housing between the ends of the blade and the housing. The Court repeatedly called attention to the failure of the plaintiff and his counsel to introduce into evidence any safety standards adopted for power lawn mowers. After exhaustive research, appellant-petitioner had found there were no such adopted standards for power lawn mowers, that industry being somewhat in its infancy in 1959, the year the mower that injured plaintiff's foot was made. The standards of safety for power lawn mowers adopted by the American Standards Association was not adopted until one year after said mower was made. Those standards are referred to in the Record.

WHEREFORE, petitioner respectfully submits that his petition should be granted.

Respectfully submitted,

/S/ Charles E. Muskett

CHARLES E. MUSKETT
1024 Carnegie Building
Atlanta, Georgia 30303

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify, in compliance with an applicable provision in paragraph 1 of Rule 21 of this Court that, upon review by writ of certiorari being sought, the required forty printed copies of a petition shall be filed, with proof of service as required by Rule 33 of this Court, I have on this date, June 24, 1967, deposited in the U. S. Mails one copy of the foregoing and within petition, marked "Air Mail", addressed to Lawyer, Lawyer, Ray and Crouch, counsel of record for the said respondents in certiorari, at their offices, Fleming Building, Des Moines, Iowa, with sufficient Air Mail postage attached to the envelope containing the copy to carry it as Air Mail to its destination.

/S/ Charles E. Muskett
CHARLES E. MUSKETT
Attorney for Petitioner

Wyman C. LOWE, Appellant,

v.

TAYLOR STEEL PRODUCTS CO., New Monarch Machine and Stamping Co., and Kollwood, Inc., each a corporation, Appellees.

No. 18068.

United States Court of Appeals
Eighth Circuit.
Feb. 23, 1967.

Action for injuries received while using a power lawn mower manufactured by defendants. The District Court for the Southern District of Iowa, Roy L. Stephenson, Chief Judge, entered judgment based on a jury verdict in favor of defendants, and plaintiff appealed. The Court of Appeals, Mehaffy, Circuit Judge, held, inter alia, that even if court had erroneously instructed on comparative negligence, it would not have been prejudicial where jury specifically found that defendants were guiltless in every particular of negligence charged.

Affirmed.

1. Courts ⇐405(16.10)

Flagrant violation of rules in preparation of plaintiff appellant's brief would have justified refusal to accept brief and summary dismissal of appeal. U.S. Ct. of App. 8th Cir. Rule 11(b), subds. 3–5, 28 U.S.C.A.

2. Courts ⇐359

Substantive law of Georgia controlled with respect to accident occurring in Georgia when plaintiff allegedly was injured while using power lawn mower manufactured by defendants.

3. Appeal and Error ⇐273(5)

Broad general exceptions to instructions violate rule providing that no party may assign as error the giving or the failure to give an instruction unless he objects thereto before jury retires to consider its verdict, stating distinctly matter to which he objects and grounds of his objection. Fed.Rules Civ.Proc. rule 51, 28 U.S.C.A.

4. Appeal and Error ⇐273(5)

Broad general exceptions to instructions were insufficient to properly preserve alleged error on appeal. Fed.Rules Civ.Proc. rule 51, 28 U.S.C.A.

5. Appeal and Error ⇐274(5)

Asserted errors to instructions not included in exceptions made to instructions by trial court cannot be considered upon appeal. Fed.Rules Civ.Proc. rule 51, 28 U.S.C.A.

6. Courts ⇐406.6(10)

Even if court had erroneously instructed on comparative negligence, it would not have been prejudicial where jury specifically found that defendants were guiltless in every particular of negligence charged.

7. Negligence ⇐97

Rule of comparative negligence could not come into play without a finding that both parties were guilty of negligence.

8. Courts ⇐406.6(10)

Harmless error rule applies to instructions as well as to other alleged errors.

9. Trial ⇐295(6)

Instructions taken as a whole fully and fairly submitted plaintiff's case to jury in action for injuries received while using a power lawn mower manufactured by defendants.

10. Federal Civil Procedure ⇐2011

Even if opinion evidence was admissible, it was not error for court to reject it where it was cumulative.

11. Courts ⇐406.6(8)
Evidence ⇐546

As general proposition, it is within court's discretion to admit opinions of an expert when it is doubtful whether the opinions would be helpful to jury in determining ultimate facts, and no prejudice can arise where the facts sought to be brought out are otherwise established by the evidence.

Wyman C. Lowe, Atlanta, Ga., pro se.

A. B. Crouch, Des Moines, Iowa, for appellees.

Before MATTHES, MEHAFFY and LAY, Circuit Judges.

MEHAFFY, Circuit Judge.

This appeal is from a judgment based on a jury verdict in favor of defendants-appellees in a personal injury action. Jurisdiction is established by diversity of citizenship and requisite amount in controversy. We affirm.

Plaintiff-appellant sought damages for injuries he received while using a power lawn mower manufactured by defendants. Plaintiff rented the power mower from a resident in the neighborhood of one of plaintiff's rent houses. Plaintiff had never before used a power mower and the owner of the mower and his twelve year old son cut a portion of the lawn. Part of the lawn area was level and part was a grassy descending bank sloping down to a circle. Plaintiff used the machine for the first time for a few minutes that afternoon on the level lawn. The owner of the mower warned plaintiff of the danger of using it on the slope. The following afternoon plaintiff returned and brought a ten foot rope which he tied to the handle of the machine and engaged the owner's twelve year old son to hold the rope as plaintiff mowed the slope. Plaintiff removed his shoes, thinking it would afford him better traction and commenced to mow the slope with the boy standing behind on the bank holding the attached rope. Plaintiff proceeded to push the mower down the slope and pull it back towards him. On about his third pass, as plaintiff was pulling the mower upward towards himself, the mower somehow got over on his left foot causing serious injury in the loss of the big toe and adjoining toe, and about two-thirds of the middle toe with injuries to the tendons and ligaments of the foot. Plaintiff stated that the mower struck what appeared to be a rock or pebble protruding about three-quarters of an inch above ground, causing the mower to jump or be jerked upon his foot. The blade of the mower was in a housing and was three and a half inches from the rear of the housing.

During pretrial procedure the trial court ordered plaintiff to state with specificity the acts relied upon constituting defendants' negligence. The plaintiff complied with the following allegations:

"1. In failing to warn users of the rotary power mower of the dangers involved in its use, and in failing to warn of the dangers of getting his feet under said mower.

"2. In designing, manufacturing, assembling and selling for general public usage, a rotary power mower not equipped with safety devices in the form of handle up-stops.

"3. In designing, manufacturing, assembling and selling for general public usage, a rotary power mower not equipped with safety devices in the form of guards around the cutting blade.

"4. In designing, manufacturing, assembling and selling for general public usage, a rotary power mower constructed so that the minimum horizontal level of the cutting blade was not even with or higher than the lower edge of the housing."

In addition to a general charge, the trial court submitted special interrogatories including queries as to defendants' negligence in respect to each of the above allegations. The jury found by its specific answers to the interrogatories that the defendants were not negligent in any of the particulars charged. In answer to other interrogatories, the jury found there was no intervening efficient cause and the only finding of negligence was on plaintiff's part.

Our task on review was made difficult by plaintiff's flagrant violation of our rules in preparation of his brief. Preliminarily we ordered plaintiff to clarify his brief and argument and to specifically point out the matters complained of.

The brief now before us violates U.S. Ct. of App. 8th Cir. Rule 11(b) Third, Fourth and Fifth, 28 U.S.C.A., in that it does not include:

"Third. —A concise statement of the case in so far as is necessary for the court to understand and decide the points to be argued in the brief * *. If a point relates to the admission or exclusion of evidence, the statement shall quote the evidence referred to, and any objections or other equivalent action taken relative thereto, together with the rulings of the court thereon * * *. If a point relied upon relates to the giving of instructions or the refusal to give instructions requested, the statement shall quote the portions of the instructions or of the requested instructions which are referred to, the objections or exceptions taken to the giving of the instructions or to the refusal to give requested instructions and the rulings of the court thereon * * *.

"Fourth. —A concise statement of each point to be argued * * *.

"Fifth. —A printed argument which shall substantially follow the order of points stated under paragraph 'Fourth'."

[1] These rules are reasonable, sensible, simple and plain. There is no reason why they should not be complied with. The violations here would fully justify our refusal to accept plaintiff's brief and summarily dismiss his appeal. Nevertheless, but not to be taken as precedent or policy, we have laboriously read the entire record, and read and re-read plaintiff's brief in an effort to ascertain his assignments of error and the validity thereof. In the portion of his brief entitled "Argument," plaintiff complains primarily of the court's charge on comparative negligence and the exclusion of the deposition of an expert witness relative to proper safety devices for power mowing machines.

[2] The accident occurred in Georgia and the substantive law of that state controls. Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Plaintiff requested only one instruction on comparative negligence and the substance of that instruction was covered in the court's charge.[1]

1. Plaintiff's requested instruction No. 13 on comparative negligence:

"You are further instructed that the principal (sic) of comparative negligence becomes applicable when you find that both the Plaintiff and the Defendants were negligent, and the negligence of each contributes to the Plaintiff's injury. Under such circumstances, it is your duty to determine the degree of the Plaintiff's negligence contributing to his injury and the degree of the Defendants' negligence contributing to the Plaintiff's injury. If you find that the degree of the Plaintiff's negligence contributing to his injury was equal to or greater than the degree of the Defendants' negligence, then the Plaintiff is not entitled to recover. But if you find that the Plaintiff's negligence was less in degree than that of the Defendants; then the Plaintiff is entitled to recover, but not the full amount of his loss and damage. Such loss and damage you should diminish in proportion to the degree of negligence which you find attributable to the Plaintiff."

The following is from the court's charge:

"Instruction 11

* * * * *

"Fourth: Was the plaintiff guilty of some negligence?

"If you should find that he was not, then, having found in plaintiff's favor in answer to the first three questions, you will proceed to determine the amount of plaintiff's damages, and return a verdict in the plaintiff's favor for that amount.

"On the other hand, if you should find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of some negligence, and that plaintiff's fault contributed as a proximate cause of any injuries which plaintiff may have sustained, then you must compare the negligence of the parties, and return a verdict in favor of the plaintiff for a reduced amount, based upon the comparison.

"Instruction 12

"The proper procedure to be followed by the jury in comparing the negligence of the parties, and returning a verdict

[3] The trial court instructed much more comprehensively on the subject of comparative negligence than was requested, and none of the instructions regarding comparative negligence as given by the court was specifically objected to by the plaintiff. Aside from a specific objection to one instruction, which was without merit, plaintiff's objections were general and used such language as "first, the plaintiff excepts and objects to the instructions as a whole * * *" and "next, that the instructions as given as a whole * * *" and "plaintiff further expects and objects to the instructions given as a whole * * *." Such general exceptions are wholly ineffective as they do not direct the trial court's attention to any specific portion of a particular instruction so that an error, if any, might be corrected. Such broad exceptions violate Fed.R.Civ.P. 51, which provides "no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

[4, 5] Plaintiff, therefore, has failed to properly preserve his alleged error on appeal. See Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1964); Apperwhite v. Ill. Cent. R. R., 289 F.2d 306, 309–310 (8th Cir. 1957); Krug v. Mutual Ben. Health & Accident Ass'n, 120 F.2d 296, 301 (8th Cir. 1941). This court said in Fidelity & Casualty Co. v. J. A. Jones Const. Co., 325 F.2d 605, 612 (8th Cir. 1963):

"Plaintiffs in their brief do not set out the exception claimed to have been made to the instruction or point to the record citation as required by our Rule 11(b) 3d. We have examined the record and do not find the exception here urged. Asserted errors to instructions not included in exceptions made to instructions by the trial court cannot be considered upon appeal. Rule 51, Fed.R.Civ.P.; Chicago Great Western Ry. v. Casura, 8 Cir., 234 F.2d 441, 445."

[6–8] Assuming *arguendo* that the court had erroneously instructed on comparative negligence, it would not have been prejudicial in this case because the jury specifically found that the defendants were guiltless in every particular of negligence charged. We find no error in the court's instruction on the law of comparative negligence but even if there had been and proper objection made thereto, we as a reviewing court would consider it harmless. It could not have affected the verdict as the rule of comparative negligence could not come into play without a finding that both parties were guilty of negligence. Since the defendants were found free of such guilt, the harmless error rule would apply. This rule applies to instructions as well as other alleged errors. Judge Van Oosterhout of this court said in Minnesota Mut. Life Ins. Co. v. Wright, 312 F.2d 655, 661 (8th Cir. 1963):

"Rule 61, Fed.R.Civ.P., like Rule 52 (a), Fed.R.Crim.P., provides that errors which do not affect the substantial rights of the parties shall be disregarded. 28 U.S.C.A. § 2111 provides that upon appeal, harmless errors shall be disregarded. The harmless error rule applies to instructions. See Moore, Federal Procedure, para. 61.09."

See also and compare Warren v. Ward, 371 F.2d 906 (8th Cir. 1967).

in favor of the plaintiff for a reduced amount based upon that comparison, is: first, determine the full amount of all damages sustained by the plaintiff, as a proximate result of the accident; next, compare the negligence or fault of the parties, by determining in what proportion, figured in percentage, plaintiff's own fault contributed as a proximate cause of all damages suffered by the plaintiff, as a proximate result of the accident; then, reduce the full amount of plaintiff's damages, by subtracting a sum equal to the percentage of the total you find, from a preponderance of the evidence in the case, was caused by plaintiff's contributory negligence; and return a verdict in favor of the plaintiff for the amount remaining."

[9] We have reviewed the court's entire charge to the jury and are convinced that when the instructions are taken as a whole, the charge fully and fairly submitted plaintiff's case to the jury. In any event, plaintiff's failure to properly make his exceptions to the trial court precludes consideration on appeal.

[10, 11] The only other substantial complaint appearing in plaintiff's "argument" is the court's exclusion of the deposition of one Brodecki, an engineer, who like plaintiff had had a toe cut off in a mower accident and had written an article containing what he would recommend as safety devices to be placed on rotary lawn mowers.[2] This article was published in a National Safety Council publication and was part of the deposition. Even if this evidence was admissible, it was not error for the court to reject it, as it was cumulative. Plaintiff argues that the article was admissible to show notice to the defendants of the requirement of up-stops, but such evidence was admitted through the testimony of another of plaintiff's expert witnesses. Additionally, an engineer from one of the defendant companies, called as a witness by plaintiff, testified that defendants made mowers both with up-stops and without them, and the reasons therefor. As a general proposition, it is within the court's discretion to admit the opinions of an expert when it is doubtful whether the opinions would be helpful to the jury in determining the ultimate fact. Ackelson v. Brown, 264 F.2d 543, 546–547 (8th Cir. 1959). And, it is elementary that no prejudice can arise where the facts sought to be brought out are otherwise established by the evidence. Vilter Mfg. Co. v. Rolaff, 110 F.2d 491, 500 (8th Cir. 1940).

We find the other assignments of error are without merit and our careful review of the entire record leaves us with the firm conviction that plaintiff was given a fair trial free of prejudicial error.

The judgment of the District Court is affirmed.

Adrian G. MASON, Libelant-Appellee,
v.
The OHIO RIVER COMPANY, Respondent-Appellant.

Evelyn WALKER, Libelant-Appellee,
v.
The OHIO RIVER COMPANY, Respondent-Appellant.

Nos. 16794, 16795.

United States Court of Appeals
Sixth Circuit.

Feb. 20, 1967.

Admiralty suits. The United States District Court for the Southern District of Ohio, Western Division, John W. Peck,

2. Objections were made to the deposition of this witness on a number of grounds including the fact that he had never seen the lawn mower involved in this litigation; that the article attached to the deposition contained only extracts from the article written by the witness, and in any event was hearsay evidence; that portions of the deposition improperly referred to insurance; and that the witness' testimony on the whole was general and indefinite, particularly as applied to the lawn mower involved in the suit and of such nature as would permit the jury to speculate as to the claims of negligence.

The trial court in sustaining the motion to suppress the deposition ruled:

"The motion to suppress is sustained. I have examined it. I think it would be error for this Court to admit the testimony contained in that deposition, for all the reasons already indicated. There is no testimony whatever about the standards of the industry or custom or usage in the industry or practices in the industry, and I just can't let a man write an article saying he thinks a mower ought to have certain things and then let it be put in evidence. It would be highly prejudicial to the defendants."

IN THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner for Certiorari

vs.

TAYLOR STEEL PRODUCTS COMPANY, NEW MONARCH MACHINE AND STAMPING COMPANY, and KOLLWOOD, INC., Each a Corporation,

Respondents in Certiorari

MOTION OF PETITIONER, WYMAN C. LOWE, FOR PERMISSION TO FILE A REWRITTEN PETITION FOR WRIT OF CERTIORARI IN SUBSTITUTION FOR AND IN LIEU OF THE PETITION HE FILED JULY 3, 1967

COMES NOW WYMAN C. LOWE, petitioner for a writ of certiorari for review of a decree by the United States Court of Appeals for the Eighth Circuit entered on February 23, 1967 in the case of "Wyman C. Lowe, Appellant v. Taylor Steel Products Company, et al, Appellees", moves to be allowed to file the herewith submitted forty printed copies of his rewritten petition for such writ in substitution for and in lieu of the petition by him therefor filed on July 3, 1967, and respectfully shows as follows:

1. Said decree affirmed a judgment rendered in said case by the United States District Court, Southern District of Iowa,

IN THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner,

vs.

TAYLOR STEEL FABRICATING COMPANY,
NOW MONARCH MANUFACTURING STAMPING
COMPANY, and JOHN D. TAYLOR,
Each a Corporation,

Respondents.

MOTION OF PETITIONER, WYMAN C. LOWE,
FOR PERMISSION TO FILE A REPLY
PETITION FOR A WRIT OF CERTIORARI IN
SUBSTITUTION FOR AND IN LIEU OF THE
PETITION FILED JULY 3, 1967

Comes now Wyman C. Lowe, petitioner for a writ of certiorari for review of a decree by the United States Court of Appeals for the Eighth Circuit entered on February 23, 1967, in the case of "Wyman C. Lowe, Appellant, v. Taylor Steel Fabricating Company, et al., Appellees", moves to be allowed to file the herewith submitted forty printed copies of his re-written petition for such writ in substitution for and in lieu of the petition by him therefor filed on July 3, 1967, and respectfully shows as follows:

1. Said decree affirmed a judgment rendered in said case by the United States District Court, Southern District of Iowa,

on September 20, 1965, and entered on that date in favor of the defendants, Taylor Steel Products Company, New Monarch Machine and Stamping Company and Kollwood, Inc., each a corporation formed under the laws of the State of Iowa.

2. In that case, the plaintiff, Wyman C. Lowe, sued the defendants for damages and injuries he received on his left foot from a rotary power lawn mower he was operating that he alleged to have been caused by acts of negligence of the defendants in designing, manufacturing, assembling and selling for general public usage said rotary power lawn mower, including failure to warn users of the danger involved in its use and dangers of getting feet under the mower.

3. Petitioner was the runner-up candidate of three candidates for United States Congressman for the Fifth District of Georgia in the September, 1966 Democratic Primary. The winning candidate for said office in that Primary was the incumbent Congressman. He withdrew his candidacy about two weeks after the date of the Primary. Two days later, nomination of a candidate in substitution for him was made by a method other than by voting of electors in a Special Primary. The substituted Democratic nominee lost in the ensuing November election to the Republican nominee for that office.

4. Under the provisions of Chapter 7, Title 2 of the U. S. Code, said Chapter being entitled "Contested Elections", petitioner began a contest of said election to the United States House of Representatives within the required period in December, 1966,

and sought to have it declared invalid mainly on the ground said substitute nomination had not been lawfully made and that applicable law required determination of the substitute nominee by a Special Primary. Between the date said substitute nomination was made and the date of the ensuing November election, petitioner sought by each of two methods to have the substitute nomination set aside and a Special Primary called to fill the vacancy caused by said withdrawal. The final determination of his contest in and to United States House of Representatives, which was adverse to him, was not made until July 11, 1967. The carrying on of the contest by him required much of his time. Being a lawyer, he lost much time from his law practice in 1966 while he was carrying on a campaign as a Congressional candidate. Emergent matters that accumulated in his law practice while he was carrying on said campaign and later the election contest have required much of his time and attention this year.

5. Before the expiration of the ninety day period following February 23, 1967, the date said decree was entered, he submitted to the Clerk of this Court a motion, addressed to the Clerk of this Court a motion, addressed to a Justice of this Court, for an extension of thirty days for filing petition for writ of certiorari for review of said decree. An extension until and including June 24, 1967 was granted. Being unable to complete the petition in desired form within that extension of time he filed another motion before June 24, 1967, addressed to a Justice, for a further extension of twenty-nine days for the purpose stated. An extension of only nine days,

until and including July 3, 1967. was granted as to that motion. As petitioner did not become aware by June 24, 1967 whether or not his said motion for second extension would be granted, he hurriedly prepared and caused to be printed a petition, but not the kind he desired to complete, together with required docketing fee, rushed it by Air Express to Washington, and caused its delivery to be made on June 24. He also caused a copy of the record in the case, certified by the Clerk of the Court of Appeals, to be sent by that Clerk, addressed to the Clerk of this Court, in such time that it was received on June 24, 1967, a Saturday. Petitioner thereby met the time requirement for filing the petition, certified copy of the record and docketing of the appeal. At about the time of the opening of the Clerk's office on Monday morning, June 26, he called the Clerk's office, requested that the petition not be docketed that day as of June 24 in event a Justice granted on that day his said motion, and in such event the forty printed copies of the petition be returned to him. A Justice granted on that day an extension until and including July 3, 1967, which was about one-third of the time he had requested in the motion.

6. He immediately began rewriting the petition and completed it in rewritten form and had all of it printed except a few pages by July 3. He had arranged with a printing office to have the remaining pages printed in time for him to effect delivery of the rewritten petition by Air Express on July 3, 1967. However, pre-holiday personnel conditions on July 3 caused the printing company not to get the remaining pages printed

in sufficient time. Consequently, petitioner arranged and did cause fast delivery of the returned forty printed copies to be made on July 3, 1967. The petition was docketed as of that date.

7. As he had received only part of the extension requested in his motion for second extension, further revised petition, had it printed in the required number of copies in the revised form, sent to the Clerk another motion, addressed to a Justice, before July 24, 1967 in which he asked extension until and including July 24 for the filing of the rewritten petition or granting of an alternative. He sent forty copies of the rewritten petition by Air Express on July 24. His motion was not granted but the Clerk indicated that he might file forty printed copies of a motion for substitution of a rewritten petition in lieu of the petition on file, and submit with them forty printed copies of a rewritten petition. The rewritten petition he had sent was returned to him at his request. He is now submitting such motion for filing, together with forty printed copies of his further re-written petition.

8. An exception and an objection of plaintiff's counsel (Record, pp. 262, 263) to Instruction No. 9 of the Trial Court to the jury (Record, pp.35-37) read:

> 'Plaintiff further excepts and objects to instruction number nine in that it contains an incomplete statement of the Georgia law, as the instruction as given places the duty of avoiding injury upon plaintiff prior to his being aware of the defendants' lack of care * *"

An exception and an objection of plaintiff's counsel (Record, pp.254,255) to the instructions as a whole (Record, pp,28-49) read:

> "Plaintiff further excepts and objects to the instructions given as a whole in that they contain an incomplete and improper statement of Georgia law applicable in this case with respect to the doctrine of comparative negligence, and particularly with respect to the duties placed upon the plaintiff prior to his being able to recover."

Reference is also made to th se parts of plaintiff's argument in his rewritten petition relating to said exceptions and objections, which ecceptions and objections having been included in his "Substituted Statement of Points" in his brief filed in the Court of Appeals.

Parts of said Instruction No. 9 are not in accordance with the following decision of an U. S. Court of Appeals which confirms in effect the two hereinbefore quoted exceptions and objections of plaintiff's counsel to instructions regarding said Georgia law, certiorari as to which decision having been denied by the Supreme Court of the United States:

> Person's failure to exercise ordinary care to escape consequences of another's neg;igence bars recovery for reulting injuries under Georgia statute only where defendant's negligence exists first and is apparent or may be readily known.
>
> Southern Ry. Co.v. Wilbanks, 67 F.2d 424, cert. denied 54 S. Ct. 530, 291 U. S. 678, 78 L. Ed.1066.

Said lack of accordance is a further reason why this motion should be granted.

WHEREFORE, petitioner moves that he be allowed to file his herewith submitted forty printed copies of his rewritten petition in substitution for and in lieu of his petition for writ of certiorari that was filed on July 3, 1967.

Respectfully submitted,

/s/ Charles E. Muskett
CHARLES E. MUSKETT

1024 Carnegie Bldg.
Atlanta, Georgia 30303

Attorney for Petitioner

AFFIDAVIT AS TO SERVICE

COUNTY OF FULTON, GEORGIA

I hereby certify that I did [redacted] Sept.12, 1967 cause delivery to be made by Air Express of a copy of the foregoing motion, except as to what follows in the body of it after paragraph 7, to Lawyer, Lawyer, Ray and Crouch, attorneys of record for said respondents in certiorari, in an envelope addressed to said law firm at its offices, Fleming Bldg., Des Moines, Iowa, the envelope being handed to Mr. James Lawyer of said firm at said address on said date; that I did cause delivery of a copy of the entire foregoing motion containing the changed paragraph 8, said changed paragraph being herein, the copy of the motion being in an envelope addressd to said law firm at said address, to the said office address of said law firm on Sept.14,1967, service thus being made upon said respondents in certiorari.

/s/Wyman C. Lowe
WYMAN C. LOWE
Petitioner and
Movant

Duly sworn and subscribed to before me, this 14th day of Sept., 1967.